(3)

No. 06-481

IN THE

Supreme Court of the United States

DEBRA LAWS, PETITIONER

v.

SONY MUSIC ENTERTAINMENT, INC., D/B/A EPIC RECORDS, A DELAWARE CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. RESPONDENT'S OPPOSITION FAILS TO PROVIDE ANY REASON WHY CERTIORARI SHOULD NOT BE GRANTED BY THIS COURT

A. The Seventh Circuit's Decision In Toney Cannot Be Reconciled With The Ninth Circuit's Decision In Laws Concerning the Right of Publicity

Respondent's Opposition attempts to distinguish the holding in *Toney v. L'Oreal*, 406 F.3d 905 (7th Cir. 2005) from *Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134 (9th Cir. 2006)* in a manner that simply does not exist. In *Toney*, the Court clearly decided that an individual's persona is not "'a "writing" of an "author" within the meaning of the copyright clause of the Constitution'" and it is not fixed under Section 301 of the Copyright Act. *Toney*, 406 F.3d at 909, quoting *Downing v. Abercrombie & Fitch*, 295 F.3d 994, 1003-04 (9th Cir. 2001). The fact that an image or voice of a person is fixed in a copyrightable medium of expression does not alter this conclusion. Under *Toney*, the fact that an individual (e.g. actor, athlete, model or singer) consented to be the subject of a copyrighted work is not a factor in the preemption analysis. Rather, the scope of the individual's consent is only relevant to the question of whether a claim for violation of the right of publicity has been established.

Under *Toney*, the right of publicity is treated no differently than a state cause of action for defamation. It is universally accepted that an author cannot write false statements about an individual and assert copyright preemption as a defense. Likewise, under *Toney*, in an action for breach of the right of publicity, the fact that the work is copyrighted would not preempt the claim, and the

scope of the subject's consent would be a matter of an affirmative defense.

Conversely, the Ninth Circuit's holding in *Laws* stands for just the opposite proposition. Illustrative of the Court's holding, Respondent states at p.7, footnote 2 of the Opposition:

> "The reproduction of Laws's recorded performance by Sony Music is analogous to the owner of a copyrighted photograph licensing it for reproduction and distribution in a book of photographs. Clearly, any claim for invasion of the right of publicity under those circumstances would be preempted."

Thus, under the *Laws* holding, a photographer that obtains a person's consent to have his or her picture taken for a high school year book could then sell or license the photograph for use in a pornographic magazine or for posting on an internet porn site and the individual's right of publicity claim would be preempted. This conclusion necessarily follows because under *Laws* the individual consented to be the subject of the photograph, the photographer owned the copyright, and the use was for reproduction and distribution. Under *Toney* an opposite result would be reached because an individual's persona (likeness or voice) is not fixed or authored within the meaning of §301 of the Copyright Act. Thus, the individual's right of publicity claim would not be preempted.

Respondent makes a further effort to distinguish *Toney* by arguing that *Toney* involved infringement by advertisement whereas Laws involved infringement by "reproduction and distribution". Respondent's Opposition, p.6. However, this argument fails because it

completely lacks any statutory basis. Nowhere in Section 301 of the Copyright Act is there any mention of the relevance of the use of the work, such as advertising. Under Section 301, preemption applies in any situation where the facts come within the terms of the section. Thus, the distinction argued by Respondent based on use for advertising is wholly irrelevant.

B. Strong Policy Considerations of National Importance Warrant Review of the Laws Decision By This Court To Provide Proper Guidance To Lower Courts Concerning the Scope And Breadth Of Section 301 of the Copyright Act As It Applies To Right Of Publicity Claims

Copyright laws were designed to protect the copyright holders' monopoly to prevent others from exploiting a work. The Right of Publicity does not clash with this goal. See Schuyler M. Moore, *Straightening Out Copyright Preemption*, U.C.L.A. Entertainment Law Review (2002). Copyright laws were not intended to infringe on other equally important rights not recognized by Copyright Law. The thrust of Respondent's argument is that the right of publicity should simply be eliminated altogether. This is clearly not the intent of copyright preemption. If the right of publicity is to exist in the 9th Circuit the decision in *Laws* must be overturned.

The conflict between the *Laws* and *Toney* decisions threatens to destabilize exploitation of copyrights far more than the minor differences between the various states' right of publicity laws. Both the artist and the copyright holder now have uncertainty whether other circuits will follow *Laws* or *Toney*. Indeed, the conflict which this case illustrates is even wider than *Laws* and

Toney when you consider the number of cases which have held in favor of a finding of no preemption under similar circumstances (i.e., *Toney*, *Downing*, *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997), *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988) and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) cert. denied, 506 U.S. 1080 (1993)) as opposed to the cases which have held in favor of a finding of preemption (i.e., *Laws*, *Baltimore Orioles v. Major League Baseball Players Ass'n.*, 805 F.2d 663 (7th Cir. 1986) and *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645 (1996)). This conflict will likely increase the tension between artists and copyright holders as they compete to have their agreements come under the jurisdiction of the circuit most favorable to their respective interests.

CONCLUSION

For all of the foregoing reasons, Petitioner Laws respectfully requests that this Court grant this Petition for Writ of Certiorari.

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